APR 2 1941
CHARLES ELMORE CROP
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In the

Supreme Court of the United States.

October Term, 1940.

No. 824.

The Columbian National Life Insurance Company,
Petitioner,

v.

Lena M. Rodgers,
Respondent.

REPLY BRIEF OF PETITIONER FOR CERTIORARI.

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The petitioner regrets that there should develop in this case a dispute between counsel as to the facts in the record. It feels obliged to point out, however, that it deems certain statements in the respondent's brief to be unfounded.

1. The respondent states in the first two paragraphs on page 6, and in the first paragraph on page 7 of her brief that the Circuit Court of Appeals affirmed the District Court's finding that the petitioner had "actual knowledge" of the true facts. Again, at the end of page 13, the respondent states that the Circuit Court of Appeals "approved and sustained the trial court's finding of actual knowledge on the part of the petitioner."

The petitioner respectfully suggests that a reading of the opinion below, beginning at the bottom of Record p. 117, conclusively shows that the only finding which the

Circuit Court of Appeals supported is the finding of imputed knowledge through an alleged duty of inquiry. It in no way passed upon the finding of actual knowledge, and the last sentence in the opinion, referred to by the respondent, cannot be construed, in the light of the balance of the opinion, to the contrary. If the Circuit Court of Appeals had been willing to support the District Court in its finding of actual knowledge, the greater part of its opinion would not have had to be written, as concededly actual knowledge would have been an end of the case.

2. The respondent says in the middle paragraph on page 8:

> "The records which it [the insurance company] had were *not* consistent with the truth of the statements in the application."

No argument or evidence is furnished in support of this statement of the respondent's. None could be. The records were entirely consistent. See petitioner's brief, top of page 10, and top of page 11.

3. The respondent at the middle of page 8 states as follows:

> "neither was the misrepresentation of the assured 'conscious and deliberate'. There never was a finding that insured made a conscious and deliberate misrepresentation."

In its first opinion the Circuit Court of Appeals stated:

> "We are of the opinion that the minds of reasonable men could reach but one conclusion upon the evidence adduced, namely, that the statements made by the

insured to the Insurance Company were knowingly false."

Columbian National Life Ins. Co. v. *Rodgers*, 93 F. (2d) 740, 742.

As pointed out in petitioner's original brief, the testimony material to this subject was entirely by deposition and was word for word identical at the first trial and the second. The respondent's seeming contention that the first decision is not the law of the case and is not binding is raised for the first time in this Court, and is entirely unfounded. The so-called law of the Tenth Circuit in no way differs from the applicable Kansas law. Furthermore, what constitutes proof that a particular statement is "knowingly false" is purely a question of evidence and not one of state law. In the light of the court's ruling that the misrepresentations as matter of law must be found to be knowingly false, the respondent's statement that there was no finding of conscious and deliberate falsehood, if based upon a distinction between a finding and a ruling, is pointless, and if between knowingly, conscious and deliberate, is mere verbiage.

Respectfully submitted,

F. H. NASH,
BAILEY ALDRICH.